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PERKASA TEMENGGONG SDN BHD v. PENTADBIR TANAH HULU LANGAT & ORS; PENGARAH TANAH DAN GALIAN NEGERI SELANGOR (THIRD PARTY)

HIGH COURT MALAYA, SHAH ALAM
CHOO KAH SING J
B [SUIT NO: BA-22NCVC-33-01-2020]
6 AUGUST 2022

Abstract – *In the event where the purchaser of a property at a public auction and the bank are unaware that the title deed to the property is not valid, the parties are under a common genuine mistake and the auction and the auction sale agreement would be rendered null and void. The bank is therefore under a legal obligation to refund the auction purchase price money to the purchaser.*

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LAND LAW: *Sale of land – Public auction – Bidder successfully bid for property – Bidder unable to register transfer of ownership of property to itself – Title deed to property found to be invalid – Claim for refund of purchase price – Whether auction and auction sale agreement null and void – Whether bank under legal obligation to return money – Whether bidder ought to be compensated by relevant parties*

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LAND LAW: *Sale of land – Public auction – Bidder successfully bid for property – Title deed to property found to be invalid – Claim for refund of purchase price – Whether auction and auction sale agreement null and void – Whether bank under legal obligation to return money – Bank's third party action against Director of Land and Mines Selangor ('second defendant') – Whether loss suffered by bank purchase price refunded to bidder or in relation to loan disbursed based on charges over invalid title deed intended as security for disbursement of loan to borrower – Whether bank entitled to claim purchase price from second defendant – Whether third party action filed by bank against second defendant for refund of auction purchase price money unsustainable*

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The plaintiff successfully bid for a property ('impugned property') in a public auction ('Lot 541 title'). A first charge was registered in favour of the bank on the Lot 541 title sometime in March 1999 and sometime in November 2001, a second charge was registered in favour of the third defendant ('bank') on the Lot 541 title. The charges were third party charges to secure a loan granted to one Lekoufu Enterprise as the borrower. The owner of the impugned property that was stated on the Lot 541 title was the sixth defendant. The borrower defaulted on the loan repayments and, as such, the bank obtained an order for sale of the impugned property by way of public auction. A public auction was held to auction the impugned property identified by the title particulars in the Lot 541 title and the plaintiff was the

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successful bidder. When the plaintiff attempted to register the transfer of ownership at the land office, the plaintiff discovered that there was a private caveat lodged by the sixth defendant's son. The plaintiff successfully obtained a court order to remove the said private caveat. When the plaintiff attempted to obtain the quit rent receipt as one of the documents to be submitted to the land office for the registration of the transfer of the impugned property to the plaintiff, the plaintiff was told that the quit rent receipt had already been issued to the fourth defendant. The plaintiff then carried out a land search at the land office in relation to the impugned property and discovered that there existed another title ('Lot 630 title'). The plaintiff could not register the transfer of ownership of the impugned property to itself under the Lot 541 title. The plaintiff's claim was premised on the fact that it had successfully bid for the property but it turned out that the title deed to the property was not valid and therefore, the plaintiff sought, *inter alia*, for an order from the court to order the bank, as the chargee bank, to refund the purchase price to the plaintiff. The bank denied it was liable for the plaintiff's claim and brought a third-party action against the Director of Land and Mines of Selangor ('second defendant'). The bank averred that, at all material times, the second defendant represented to the bank that there was a valid title deed to the property. Hence, the second defendant should take full responsibility in the event the bank has to refund the purchase price to the plaintiff. In the course of the pre-trial case management of this court action, the first and second defendants informed the court that the correct or valid issue document of title in relation to the impugned property was the Lot 630 title and not the Lot 541 title. The parties thus consented to the main suit and the bank's third-party action to be disposed of by way of O. 14A of the Rules of Court 2012.

Held (allowing plaintiff's claim; dismissing bank's third party action):

(1) Neither the plaintiff nor the bank were aware of the fact that the Lot 541 title was not valid when the auction sale agreement was entered into. The plaintiff and the bank mistakenly believed they had concluded the sale and purchase of a property under a valid Lot 541 title. They also mistakenly believed the bank had the lawful right as chargee under the National Land Code to sell the impugned property to the plaintiff. Clearly, the parties were under a common genuine mistake as to a matter of fact essential to the agreement. There was no fault on either party in the auction sale agreement. Hence, the auction and the auction sale agreement ought to be declared as null and void *ab initio* (s. 21 of the Contracts Act 1950). (para 20)

(2) When an agreement is discovered to be void, or a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the

person from whom he received it – s. 66 of the Contracts Act 1950. Hence, the bank was under a legal obligation to return the money that the plaintiff had paid. The plaintiff paid a sum of RM230,000 to the bank, and the bank had received the consideration sum or had received the advantage under the auction sale agreement. Therefore, the bank was required or was bound to refund the money to the plaintiff. (para 21)

(3) The bank could not rely on the statement 'Prospective bidders are advised to conduct an official search at the relevant Land Office and inspect all liabilities, encumbrances and to identify the correct subject property prior to the auction sale' in the circumstances of this case because the subject matter forming the essential part of the agreement did not exist. The bank also could not rely on cl. 23 in the proclamation of sale for the same reason. The subject matter which formed the basis of the auction was the property under Lot 541 title and the auction sale contract was premised on the right of the bank as chargee under Lot 541 title. By operation of law, the auction agreement was void. Therefore, cl. 23 of the proclamation of sale had no relevance since the auction sale agreement was void. (para 22)

(4) With regard to the expenses incurred by the plaintiff, the first and second defendants were responsible to compensate the plaintiff (i) for the sum of RM1,448 paid by the plaintiff for quit rent for the impugned property under the invalid Lot 541 title; (ii) for the sum of RM5,500 incurred by the plaintiff to remove a caveat lodged on the Lot 541 title; (iii) in relation to the stamp duty of RM3,600 paid by the plaintiff for the attempted transfer of the impugned property under the Lot 541 title. The plaintiff's losses were to be compensated by the relevant parties, hence the plaintiff's claim had been properly disposed. (paras 25-27)

(5) The bank was not entitled to claim the purchase price from the first and second defendants in the third-party action because the loss suffered by the bank was not the purchase price refunded to the plaintiff. The loss suffered by the bank was in relation to the loan it had made to the borrower on the premise of its charges on the Lot 541 title that was invalidly issued by the first and second defendants. Hence, the actual loss of the bank was not the refund of the plaintiff's money, rather the bank's loss was the money it had disbursed to the borrower because the second defendant accepted the invalid Lot 541 title to register the bank as charge of the impugned property which the bank accepted as security for the loan. Hence, the third-party action filed by the bank against the second defendant for the compensation for the refund of the auction purchase price money was unsustainable. (paras 30 & 31)

Legislation referred to:
Contracts Act 1950, ss. 21, 66
Rules of Court 2012, O. 14A

For the plaintiff - Rehvathi Krishsamy; M/s Teh Soon Kee & Partners
For the 1st & 2nd defendants - Nor Fariza Ridzuan; SLO, Selangor
For the 3rd defendant - Cheah Fann Jin; M/s Shook Lin & Bok

Reported by Suhainah Wahiduddin

JUDGMENT

Choo Kah Sing J:

Introduction

[1] The plaintiff's claim is premised on the fact that it had successfully bid for a property in a public auction, but it turned out that the title deed to the property was not valid. The plaintiff, therefore, seeks, *inter alia*, for an order from the court to order the third defendant, Alliance Bank Malaysia Berhad (hereafter 'the bank'), as the chargee bank (or the plaintiff in the auction proceeding Execution No. 38-314-03-2015) to refund the purchase price to the plaintiff.

[2] The bank denies it is liable for the plaintiff's claim. The bank has brought a third-party action against the Director of Land and Mines of Selangor (the second defendant in the main suit). The bank avers that at all material times the Director of Land and Mines of Selangor represented to the bank that there was a valid title deed to the property. Hence, the Director of Land and Mines Selangor should take full responsibility in the event the bank has to refund the purchase price to the plaintiff.

[3] The above is an abstract which summarises the crux of the main parties' disputes before this court.

The Background Facts

[4] The plaintiff had successfully bid for a property (hereafter 'the impugned property') in a public auction with the title deed particulars HS(D) 42128, Lot 541, Section 8, Pekan Semenyih, Daerah Ulu Langat, Negeri Selangor as stated on the issue document of title (hereafter "Lot 541 title").

[5] A first charge was registered in favour of the bank on the Lot 541 title sometime in March 1999. Sometime in November 2001, a second charge was registered in favour of the bank on the Lot 541 title. The charges were third party charges to secure a loan granted to one Lekoufu Enterprise as the borrower. The owner of the impugned property that was stated on the Lot 541 title was one Kamalam a/p K Murugasa (the sixth defendant).

[6] The borrower defaulted on the loan repayments. As such, the bank took out an originating summons *via* suit No. 24FC-1274-09-2014 to enforce its right under the National Land Code to recover the defaulted loan sum, and on 16 December 2014, the bank obtained an order for sale of the impugned property (or the charged property in the Lot 541 title) by way of public auction from the High Court of Shah Alam, Selangor.

[7] On 1 July 2015, a public auction was held to auction the impugned property identified by the title particulars in the Lot 541 title. The plaintiff was the successful bidder. The plaintiff paid the successful auction price in full for the impugned property. When the plaintiff attempted to register the transfer of ownership at the land office, the plaintiff discovered that there was a private caveat lodged by the sixth defendant's son. On 12 November 2018, the plaintiff successfully obtained a court order *via* Originating Summons No. BA-24NCVC-647-06-2018 to remove the said private caveat.

[8] The plaintiff had to submit a copy of the quit rent receipt as one of the documents to be submitted to the land office for the registration of the transfer of the impugned property to the plaintiff. When the plaintiff attempted to obtain the quit rent receipt from Majlis Perbandaran Kajang, the plaintiff was told that the quit rent receipt had already been issued to one Lee Pay Shin, the fourth defendant. The plaintiff was baffled and could not obtain any clarification or explanation from the authorities, including the land office, as to why the quit rent receipt was issued to Lee Pay Shin.

[9] The plaintiff then carried out a land search at the land office in relation to the impugned property and discovered that there exists another title particulars HS(D) 4261, Lot No. 630, Pekan Semenyih, Daerah Ulu Langat, Negeri Selangor (hereafter "Lot 630 title"). The Lot 630 title refers to the same impugned property.

[10] The plaintiff could not register the transfer of ownership of the impugned property to itself under the Lot 541 title. The plaintiff then filed this action to compel the first and second defendants to investigate why the impugned property has two different title deeds and which deed title is the actual title deed to the impugned property.

[11] In the course of the pre-trial case management of this court action, the counsel for the first and second defendants, after having investigated the matter internally, informed the court that the correct or valid issue document of title in relation to the impugned property is the Lot 630 title, and not the Lot 541 title.

[12] The Lot 630 title identifies the registered proprietor as Chang Nyet Ching who is the fifth defendant in the main action. The fifth defendant avers that she bought the impugned property under the Lot 630 title from the fourth defendant. The fourth defendant confirms she sold the impugned property under the Lot 630 title to the fifth defendant.

[13] After having obtained the confirmation from the first and second defendants that the correct and valid title to the impugned property is Lot 630 title, the plaintiff decided to withdraw its claim against the fourth and sixth defendants in the main action. At the same time, fifth defendant also withdrew her third-party action against the Director of Land and Mines Selangor (second defendant in the main suit) and the fourth defendant (in the main suit). All the parties agreed that the fifth defendant is the lawful registered proprietor of the impugned property under Lot 630 title. The parties accepted as fact that the Lot 630 title is the correct and valid title and the Lot 541 title is an invalid title following the first and second defendants' confirmation to the court.

[14] With regard to sixth defendant, the sixth defendant has earlier applied to be added as the sixth defendant in the plaintiff's action. The sixth defendant asserts her interest as the named registered owner on Lot 541 title has been affected. According to the sixth defendant's narrative, in late 2018, she filed a civil suit in the High Court of Shah Alam *via* suit No. BA-22NCVC-498-10-2018 (hereafter 'the suit 498').

[15] In the suit 498, the sixth defendant (as the plaintiff in the suit 498) sued Lekoufu Enterprise (the borrower) and its proprietors (Wong Wai Hong, Ng Say Hoo and Lim Seng Guan) and the bank. In gist, the sixth defendant avers she and her husband were cheated by Lekoufu Enterprise and its proprietors in that they fraudulently obtained a bank loan from the bank which resulted in charges over the impugned property. The sixth defendant denies she has executed any charge document to facilitate Lekoufu Enterprise to obtain the loan from the bank. The sixth defendant also avers she did not receive any notice pertaining to the auction of the impugned property. She only found out about the auction when she discovered that the private caveat that was lodged by her son was removed. Hence, she took out the suit 498 against Lekoufu Enterprise and its proprietors and the bank for her losses.

[16] While the suit 498 was still pending in the High Court, the plaintiff here took out this action in January 2020. As such, the sixth defendant wanted to add as a party in this action to assert her right and interest in the impugned property under Lot 541 title.

[17] After the parties had agreed to the facts that the Lot 630 title is the valid title and that the Lot 541 title was invalid, the parties consented to the main suit and the bank's third-party action to be disposed by way of O. 14A of the Rules of Court 2012. The questions of law will be mentioned in the relevant part of the judgment below.

The Findings Of This Court

[18] At the time of the filing of the suit, the plaintiff did not know which of the two title deeds is the correct or valid title deed. Hence, the plaintiff's claim was not mounted on a void contract. Instead, the claim was mounted on the causes of action of negligence and/or breach of contract. Based on the

agreed fact that the Lot 541 title is an invalid title, the parties consented to the framing of the questions of law for decision by this court by way of O. 14A of the Rules of Court 2012.

[19] Insofar as the plaintiff's claim is concerned, it had purchased a property identified by the particulars in the Lot 541 title that was not a valid title. It was not possible to register any transfer of ownership of a property under the Lot 541 title under the legal framework of the National Land Code.

[20] Neither the plaintiff nor the bank was aware of the fact that the Lot 541 title was not valid when the auction sale agreement was entered into. The plaintiff and the bank mistakenly believed they had concluded the sale and purchase of a property under a valid Lot 541 title. They also mistakenly believed the bank had the lawful right as chargee under the National Land Code to sell the impugned property to the plaintiff. Clearly, the parties were under a common mistake, a genuine mistake, as to a matter of fact essential to the agreement. There was no fault on either party in the auction sale agreement. In such situation, under the law of contract, s. 21 of the Contracts Act 1950 states: "Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void." Hence, the auction and the auction sale agreement ought to be declared as null and void *ab initio*.

[21] Based on the above finding, it follows that "when an agreement is discovered to be void, or a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it" – s. 66 of the Contracts Act 1950. Hence, the bank is under legal obligation to return the money that the plaintiff had paid. The plaintiff paid a sum of RM230,000 to the bank, and the bank has received the consideration sum or has received the advantage under the auction sale agreement. Therefore, the bank is required or is bound to refund the money to the plaintiff.

[22] The bank's counsel submitted that the bank could rely on this: "prospective bidders are advised to conduct an official search at the relevant land office and inspect all liabilities, encumbrances and to identify the correct subject property prior to the auction sale". The court finds that the bank could not rely on this statement in the circumstances of this case because the subject matter forming the essential part of the agreement does not exist. The court likewise finds the bank could not rely on cl. 23 in the proclamation of sale for the same reason. The subject matter which forms the basis of the auction was the property under Lot 541 title and the auction sale contract was premised on the right of the bank as chargee under Lot 541 title. By operation of the law the auction agreement is void. Therefore, cl. 23 in the proclamation of sale has no relevance since the auction sale agreement is void.

[23] Based on the above findings, this court answers the questions of law (which have been paraphrased) in encl. 112 (the main suit) as below:

Question 1 : What is the status of the public auction?

Answer : The status of the public auction is declared null and void.

Question 2 : Is the Bank entitled to the purchase price?

Answer : No.

[24] Insofar as the questions of law for questions 3, 4 and 5 are concerned, they are related to the first and second defendants. This court is of the considered view that it is not necessary for the court to answer those questions 3, 4 and 5 because the first and second defendants have admitted responsibility and have informed the court that the first and second defendants are ready to offer to the registered owner, *ie*, the sixth defendant, another property of the same value as the purchase price in the auction (see para. 6 of the first and second defendants' counsel's submission – encl. 119).

[25] With regard to the expenses incurred by the plaintiff, this court finds that the first and second defendants are responsible to compensate the plaintiff for the expenses incurred, except for the miscellaneous costs. In relation to the sum of RM1,448 paid by the plaintiff for quit rent for the impugned property under the invalid Lot 541 title, this court finds that the first and second defendants should compensate this sum to the plaintiff because the first and second defendants had accepted the payment despite the Lot 541 title being invalid.

[26] In relation to the costs of RM5,500 incurred by the plaintiff to remove a caveat lodged on the Lot 541 title, this court finds that the first and second defendants should compensate the plaintiff because they had allowed a caveat to be lodged despite the Lot 541 title being invalid. In relation to the stamp duty of RM3,600 paid by the plaintiff for the attempted transfer of the impugned property under the Lot 541 title, the expense was wasted as the transfer was rejected by the first and second defendants, so the first and second defendants should compensate the plaintiff for this cost as well.

[27] In view of the findings of this court in the main suit, the court has ordered for the plaintiff's losses to be compensated by the relevant parties. Hence, the plaintiff's claim has been properly disposed.

The Bank's Third-Party Action – Against The Second Defendant (In The Main Suit)

[28] The bank is seeking an indemnity from the second defendant (in the main suit) in its third-party action for any sum it is liable to pay the plaintiff. This court is of the considered view that the bank's third-party action against the second defendant ought to fail following the court's findings for the main action. The reasons are set out as below.

[29] In the main action, the plaintiff sought for a refund for the purchase price it had paid for the purchase of the impugned property with an invalid title deed. The money was paid to the bank, and the bank could not transfer and deliver the subject matter of the sale. Following the court's finding that the auction sale contract was void, the bank has to compensate the plaintiff for the benefit or advantage it has received by operation of the law.

[30] This court finds that the bank is not entitled to claim the purchase price from the first and second defendants in the third-party action because the loss suffered by the bank is not the purchase price refunded to the plaintiff. The loss suffered by the bank is in relation to the loan it had made to the borrower on the premise of its charges on the Lot 541 title that was invalidly issued by the first and second defendants.

[31] The bank's entire problem sprung from the time the second defendant registered the charges on the Lot 541 title as security for the loan to be made by the bank to the borrower. If there is any loss on the bank's part, it ought to begin from the point the second defendant accepted an invalid title deed to register the bank as the chargee. Hence, the actual loss of the bank is not the refund of the plaintiff's money, rather the bank's loss is the money it had disbursed to the borrower because the second defendant accepted the invalid Lot 541 title to register the bank as chargee of the impugned property which the bank accepted as security for the loan. Hence, the third-party action filed by the bank against the second defendant for the compensation for the refund auction purchase price money is unsustainable. The bank actual loss is not the refund of the auction purchase price money, but the loss in respect of the loan it had disbursed based on the charges on an invalid title deed.

[32] The bank should sue the second defendant in a separate action to recover its losses arising from the second defendant's accepting of the charges over the invalid Lot 541 title. At the time the decision of this court was delivered on 8 December 2021, suit 498 was still pending. The bank was advised by this court to consider pursuing any claims it may have against, *inter alia*, the sixth defendant, the borrower and the Director of Land and Mines of Selangor for its losses in relation to the loan in the suit 498.

[33] As for the question whether the second defendant should be responsible to the bank for the refund of the auction purchase price money to the plaintiff, this court answers this question in the negative. As explained above, the bank's loss is not in respect of the refund of the auction purchase price money. The bank loss is in relation to the loan that has been disbursed based on the charges over an invalid title deed which were intended as security for the disbursement of the loan to the borrower. Hence, the bank's third-party action against the second defendant for the refund of the auction purchase price money ought to fail. The court's finding and decision in the

third-party action does not preclude the bank from pursuing its claims against the second defendant based on any cause of action which is premised on the second defendant's accepting and registering the bank's charges on the invalid Lot 541 title. The parties, in fact, have agreed that any issue concerning the validity of the charge(s) ought to be determined in suit 498, not in this court.

Conclusion

[34] For the above reasons, in the main action, this court allows the plaintiff's claim and orders (i) the bank to return the sum of RM230,000 to the plaintiff, (ii) the first and second defendants to be jointly and/or severally liable to compensate the plaintiff for the sums of RM3,600, RM1,448 and RM5,500.

[35] This court also orders the first, second and third defendants to pay costs of RM5,000 (subject to allocator fees) each to the plaintiff.

[36] As for the bank's third-party action against the second defendant, this court dismisses the third-party action, and this court also orders the bank to pay costs of RM5,000 (subject to allocator fees) to the second defendant. Lastly, this court declares that the Lot 541 title as invalid.